RM

EMPLOYMENT TRIBUNALS

Claimant: **Miss G Okwu**

Respondent: **Rise Community Action (A company limited by guarantee)**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **18, 19 October, 12 November 2018, in chambers on 19 November 2018 and on remission from EAT on 21 June 2021 and in chambers on 30 June 2021**

Before: **Employment Judge Hallen**
Members: **Mr S Morphew**
Mr D Ross

Representation
Claimant: In Person
Respondent: Mr J Nkawfu (Counsel)

JUDGMENT

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform. A face-to-face hearing was not held because the relevant matters could be determined in a remote hearing.

It is the unanimous judgment of the Employment Tribunal that: -

1. **The Claimant's claims for unfair dismissal for making a protected disclosure under Section 103(A) Employment Rights Act 1996 contrary to Section 47(b) and (c) of the Employment Rights Act 1996 are unfounded and dismissed.**

REASONS

Background

1. The Claimant appealed against the judgement of this Employment Tribunal which sat on 18 and 19 October and on 12 October 2018 with a further day in chambers on 19 November 2018 which dismissed the claimants claim of automatic unfair dismissal for having made a protected disclosure. The Claimant appealed to the Employment Appeal Tribunal contending that this Tribunal had erred in its approach to the question of protected disclosure, had failed to make proper findings or engaged with her case on the reason for the dismissal and had conducted the hearing unfairly.

2. The Employment Appeal Tribunal on 24 June 2019 allowed the Claimant's appeal on a limited basis. The basis was that this Tribunal had failed to ask whether the Claimant had a reasonable belief that her disclosure relating to potential breaches of the Data Protection Act made in respect of point (iii) of her letter of 21 February 2018 was in the public interest and it failed to explain why it considered the disclosure lacked sufficient detail. The appeal was also allowed on the basis that this Tribunal had not made clear findings that the Claimant's dismissal was performance or conduct related and failed to demonstrate engagement with the Claimant's case or properly explain its reasons for rejecting that case. As a consequence, the Employment Appeal Tribunal remitted the matter to the same Tribunal to consider whether the disclosure in point (iii) of the Claimant's letter of 21 February 2018 was in the reasonable belief of the Claimant in the public interest? In this regard did the disclosure show one of those things listed in Section 43b of the ERA 1996? Finally, the Tribunal had to ascertain whether the Respondent's dismissal of the Claimant was motivated by that protected disclosure?

3. This Tribunal made directions in respect of the issues identified above on 5 December 2019 and confirmed that this Tribunal had to determine the question of protected disclosure (limited to the matter raised by point (iii) of the Claimants letter of 21 February 2018) and of the reason for the Claimant's dismissal. Point (iii) of the Claimant's letter highlighted by the Employment Appeal Tribunal stated, *'there was no Internet or phone for the first six weeks of my employment. There is still no reliable Internet access and the mobile phone in the office is a shared one, and this is a breach of the DPA. It also has other people's social media accounts and other things running in the background due to the sensitivity of the data emanating from my posts and to the DPA complaint, I should have been provided with a phone for my sole use. I have asked and nothing has been done. I have also raised concerns about other breaches of the DPA, for example, I have had to store a service users personal file containing personal, sensitive information in an unlocked draw.'*

4. The Tribunal heard the evidence of the Claimant and Respondent at the hearing on 18, 19 October 2018 and on 12 November 2018 so it was not necessary to rehear any further evidence. The parties were directed to provide written submissions dealing with the issues raised above and a further hearing was originally ordered to take place on Tuesday 31 March 2020 to consider the oral and written submissions of the parties as directed above. However, due to the pandemic the hearing could not take place until Monday 21 June 2021 by way of CVP hybrid hearing. The parties and members attended via their homes and the Judge attended the hearing at the Tribunal office.

5. At the hearing, the Tribunal had in front of it the original trial bundle, the Claimants original witness statement and the Respondents witnesses' statements from the first hearing. The Tribunal also had its notes of evidence, which included the representations made by the parties at the first Tribunal hearing. In addition, the Tribunal had in front of it, its first judgement and the judgement of the Employment Appeal Tribunal.

6. The Claimant did not make written submissions for this remitted hearing relying upon the submissions originally made to this Tribunal and the submissions made to the Employment Appeal Tribunal. At the hearing, the Respondent's counsel made oral representations to support his written submissions and the Claimant was given an opportunity to make an oral response to those oral submissions from the Respondent. At the end of the hearing, this Tribunal reserved its decision and confirmed that it would write to the parties with written reasons for the decision contained herein.

Facts

7. The chronology of events and facts are set out in the first tribunal decision, so it is not necessary to repeat those facts in this judgment save as to make additional findings of fact that support the Tribunal's conclusions below.

8. In this Tribunal's first judgement at paragraph 17, it found that the Respondent extended the Claimant's three months probation period for a further three-month period expiring on 15 May 2018 by way of letter dated 14 February 2018 at page 121 of the bundle. In this letter, it was made clear to the Claimant that she would continue to work with her line manager to look at her targets and have monthly supervision sessions. Thereafter, at paragraph 18 of the first judgement, the Claimant wrote a letter of 21 February 2018 which was at pages 122 to 127 of the trial bundle. It raised a number of issues relating to her contract of employment, provision of pension and provision of company policies which this Tribunal in the first judgment found not to be protected disclosures. In addition, the Tribunal found that these items had already been provided to the Claimant and/or information provided to her in respect of them. Therefore, the Tribunal found that the reference made to these items in the Claimant's letter of 21 February was not an accurate representation of what had already taken place. In addition, the Claimant referenced the protected disclosure at point (iii) of the letter. This referred to there being no Internet or phone provision for six weeks and the mobile phone being shared in breach of the DPA. The Claimant also referenced that other people's social media accounts were on the mobile phone running in the background and that as she used the phone for sensitive information, and this may also be a breach of the DPA. The Claimant also raised the matter of personal files containing personal sensitive information being kept in an unlocked draw.

9. At page 142 of the bundle of documents there is a note of a supervision note between the Claimant and her line manager Ms. Murungi dated 21 February 2018 which outlined the Respondents expected performance targets for the Claimant. These included targets to increase the number of service users for the Respondent's services and outreach work that was expected of the Claimant. At pages 139 to 141 of the bundle are the Claimant's own notes of this meeting which confirm that it was a supervision meeting setting targets for her. In addition, at the end of the meeting, the Claimant confirms in her own words how difficult it was for her line manager to manage her and for her to take instructions by saying, '*Her voice rose and she said that I was criticising her. I asked her why she always used this ruse when I was asking her serious questions. I saw no point in continuing so I packed up for the day……'*

10. In the first judgment at paragraph 19, the Tribunal found that the Respondent's management committee met on 24 February 2018 to discuss the Claimant's letter and the minutes of that management committee meeting were at pages 143 to 146 of the bundle of documents. At paragraph 19 of the first judgment, the Tribunal found that following receipt by the Respondents management committee of the Claimant's letter 21 February 2018 and the Claimant's making unfounded allegations in respect of contractual documentation which she said was not provided to her, the Respondent decided to terminate the Claimant's employment as it was satisfied to the Claimant was not prepared to take reasonable instruction from the Respondent in respect of the performance issues that had already been identified to the Claimant.

11. Reviewing the management committee minutes again for this hearing the Tribunal found that at item two of the minutes, the management committee asked the Claimant's line manager for an update on the employees conduct and performance since the extension of her probation period on 14 February. The management committee were informed that the Claimant had not met any of her goals up to the extension and had not subsequently improved the rate of client referrals. It was specified that this had not increased at all up to the date of the management committee meeting on 24 February 2018. The line manager also informed the management committee that the Claimant was still not promoting the service of the centre to the wider community and thus no referrals were coming in. Furthermore, the Claimant's taking of instructions from the line manager was still an issue and the Claimant continued not to follow her instructions and continued to be obstructive since the extension of her probation period on 14 February. In addition, the line manager referenced complaints from service users concerning the Claimant's conduct and referred to a particular example in which a service user named JL had made a written complaint specifying that the Claimant had 'an attitude and a bully spirit." The user went on to say that the Claimant 'acted in a shameful disgraceful manner', was 'rude' and added 'pain to injury' already sustained by the service user by way of her conduct.

12. As a consequence of the Claimant's continued failure to hit targets, continued failure to follow her line managers instructions and complaints received from users of the charity, the management committee decided that it was "not worth" continuing her probationary employment with the Respondent.

13. The management committee determined that the Claimant was 'detrimental' to the charity and that she should not have written her letter in the manner that she had as her line manager had already addressed most of the personal contractual issues contained therein. It was further decided that because of her conduct and non-performance and the way that she interacted with staff members and service users, the Respondent would end the probationary period early and sent out the reasons for dismissal in writing.

14. At paragraph 20 of the first judgment the Tribunal made reference to the letter of dismissal which was dated 28 February 2018 and set out the reasons for dismissal. The Claimant gave evidence at the first hearing that nothing had changed from 14 February 2018 when the probation period had been extended by three months to 28 February when she was dismissed by the Respondent save for the protected disclosure made at point (iii) of her letter of 21 February and that the dismissal must have been materially influenced by that disclosure. In response to the Claimant's assertion that nothing had changed from 14 February to 28 February 2018 save for her letter of 21 February containing item (iii) of her letter, after reviewing the letter of dismissal and the notes of the management committee, the Tribunal found that there were a number of items that did change. Firstly, she continued to fail to hit her targets in terms of referrals to the centre. Secondly, she continued to fail to promote the services of the centre as previously instructed. Thirdly, she continued to fail to take instruction from her line manager and act rudely towards her. Finally, the Respondent received several complaints from users and referenced one specific written complaint from JL about the Claimant's conduct.

Law

15. The relevant section of the Employment Rights Act (ERA) 1996 is section 43 which defines the meaning of protected disclosure. Section 43(a) says as follows:

"In this Act a "Protected Disclosure" means a qualifying disclosure (as defined by section 43(b)) which is made by a worker in accordance with any of sections 43(c) – 43(h)."

43(b) – Disclosure qualifying for protection:

"(i) In this part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure (is made in the public interest) and, tends to show one or more of the following –

(a) that a criminal offence has been committed, is being committed or likely to be committed;

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur;

(d) that the health and safety of any individual has been, is being or is likely to be endangered;

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the proceeding paragraphs has been, is being or is likely to be deliberately concealed."

43(c) – Disclosure to Employer or other responsible person:

"(i) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure …
(a) to his employer ...

103 A ERA - An employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employer made a protective disclosure."

16. The basic issues for the Tribunal were: -

16.1 Was there a protective disclosure or disclosures?

16.2 Was that protected disclosure/were those protected disclosures the reason or principal reason for the Claimant's dismissal?

Test for protected disclosures

17. Any such disclosure must be:-

17.1 "Disclosure of information"

17.2 Must be a “qualifying disclosure i.e. one that in the reasonable belief of the worker making it is made in the public interest and

17.3 Tends to show that one or more of six “relevant failures” has occurred or is likely to occur.

17.4 Must be made in accordance with one of the specified methods of disclosure.

18. A disclosure may concern new information, in the sense of telling any person something of which they were previously unaware, or it can simply involve drawing a person’s attention to a matter of which they are already aware (Section 43(l)(3), ERA 1996). The worker making a disclosure must actually “convey facts”, even if those facts are already known to the recipient (Cavendish Munroe Professional Risks Management Limited v Geduld (2010) IRLR38EAT at Paragraph 24 and 25).

19. In Kilraine the London Borough of Wandsworth 2018 EWCA Civ 1436, the Court of Appeal held that “information” in the context of Section 43(b) is capable of covering statements which might also be characterised as allegations. Rather than introducing a rigid dichotomy between information and allegations, the EAT in Cavendish Munroe had merely held that a statement which was general and void of specific factual content could not be said to be a disclosure of information tending to show a relevant failure. The word “information” in Section 43(b)(i) has to be read with the qualifying phrase “tends to show”. For a statement or disclosure to be a qualifying disclosure, it has to have sufficient actual content and be sufficiently specific as to be capable of tending to show one of the matters listed in Section 43B(i)(a) – (f).

20. As for what might constitute a disclosure of information for the purposes of section 43b ERA, in Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436 CA, Sales LJ (as he then was) provided the following guidance: “…30. the concept of "information" as used in section 43B(1) is capable of covering statements which might also be characterised as allegations. Langstaff J made the same point in the Judgment below at [30], set out above, and I would respectfully endorse what he says there. Section 43B(1) should not be glossed to introduce into it a rigid dichotomy between “information” on the one hand and “allegations” on the other. Indeed, Ms Belgrave did not suggest that Langstaff J’s approach was at all objectionable. 31. On the other hand, although sometimes a statement which can be characterised as an allegation will also constitute "information" and amount to a qualifying disclosure within section 43B(1), not every statement involving an allegation will do so. Whether a particular allegation amounts to a qualifying disclosure under section 43B(1) will depend on whether it falls within the language used in that provision. 35.The question in each case in relation to section 43B(1) (as it stood prior to amendment in 2013) is whether a particular statement or disclosure is a “disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the [matters set out in sub-paragraphs (a) to (f)]”. Grammatically, the word “information” has to be read with the qualifying phrase, “which tends to show [etc]” (as, for example, in the present case, information which tends to show “that a person has failed or is likely to fail to comply with any legal obligation to which he is subject”). In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1). The statements in the solicitors’ letter in Cavendish Munro did not meet

that standard." 36. Whether an identified statement or disclosure in any particular case does meet that B standard will be a matter for evaluative judgment by a tribunal in the light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in section 43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters. As explained by Underhill LJ in Chesterton Global at [8], this has both a subjective and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief."

21. The reference to the amendment in 2013 (paragraph 35 of Kilraine) is to the inclusion of a requirement that the disclosure be one that, in the reasonable belief of the worker in question, "is made in the public interest." This requirement was considered by the Court of Appeal in the case of Chesterton Global Limited (t/a Chestertons) v Nurmohamed [2017] EWCA Civ 979, in which it was held that there may not be a white line between personal and public interest, with any element of the former ruling out the statutory protection: where there are mixed interests, it will be for the ET to rule, as a matter of fact, as to whether there was sufficient public interest to qualify under the legislation.

Public Interest Component

22. The disclosure will only be a qualifying disclosure if the worker also reasonably believes that the disclosure is in the public interest. The ambit of this requirement has been recently considered by the Court of Appeal in Chesterton Global Limited (t/a Chestertons) v Nurmohamed (2017) EWCA Civ 979. The Tribunal has to determine (a) whether the worker subjectively believed at the time that the disclosure was in the public interest and (b) if so, whether that belief was objectively reasonable. The legislation does not define what "the public interest" means in the context of qualifying disclosure although Employment Tribunals must be intended to apply it "as a matter of educated impression' looking at the following factors: -

22.1 The numbers in the group whose interests the disclosure served.

22.2 The nature of interests affected and the extent in which they are affected by the wrong being disclosed.

22.3 The nature of the alleged wrongdoing disclosed.

22.4 The identity of the alleged wrong doer.

Reason for Dismissal

23. An employee who lacks the requisite continuous service to claim ordinary unfair dismissal has the burden of showing, on the balance of probabilities, that the reason for dismissal was an automatically unfair reason (Smith v Hayle Town Council 1978 ICR 996) Court of Appeal. The EAT in Ross v Eddy Stobbart Limited EAT0068/30 confirmed that the same approach applied to whistle blowing cases. The Claimant must show that her alleged protected disclosures were the principal reason for her dismissal and/or any other detriments that she asserted she suffered during the probation period.

24. Once she has done that the burden of proof is on the employer: under the statute, it is for the employer to show the ground on which any act or omission was done. The causation test in cases of victimisation for whistleblowing is whether the protected disclosure materially influenced the employer's treatment of the whistle-blower (in the sense of being more than a trivial influence- NHS Manchester v Fecitt [2012] IRLR 64). The 'in no sense whatsoever' test set out in Igen v Wong [2005] IRLR 258 as applying in cases of discrimination is not strictly applicable since it has an EU context (and the whistleblowing legislation is purely domestic law), but the same underlying principle that unlawful discriminatory considerations should not be tolerated and ought not to have any influence on an employer's decisions, is equally applicable.

Tribunal's Conclusions

25. In the first instance, the Tribunal had to determine whether the disclosure in point (iii) of the Claimant's letter of 21 February 2018 was in the reasonable belief of the Claimant in the public interest? In this regard did the disclosure show one of those things listed in Section 43B of the ERA 1996. It should be noted that this disclosure was made with four other disclosures by the Claimant that the Tribunal had found were not qualifying disclosures and with which the Employment Appeal Tribunal in its judgment agreed. The disclosure that the Employment Appeal Tribunal referred back to this Tribunal to consider was the disclosure at point (iii) of the letter of 21 February 2018. This was *'there was no Internet or phone for the first six weeks of my employment. There is still no reliable Internet access and the mobile phone in the office is a shared one, and this is a breach of the DPA. It also has other people's social media accounts and other things running in the background due to the sensitivity of the data emanating from my posts and to the DPA complaint, I should have been provided with a phone for my sole use. I have asked and nothing has been done. I have also raised concerns about other breaches of the DPA, for example, I have had to store a service users personal file containing personal, sensitive information in an unlocked draw.'*

26. After reconsidering the evidence, the Tribunal concluded that this did amount to a protected disclosure under section 43C ERA. It was a disclosure of information which, in the reasonable belief of the Claimant showed or tended to show that a person (namely the Respondent) had failed or was failing or was likely to fail to comply with a legal obligation. The Tribunal also found that the statement at point (iii) of the Claimant's letter did have sufficient factual content and specificity such as was capable of tending to show one of the matters listed in subsection 43 B (1) of the ERA. The Tribunal accepted that in this case the Claimant complained that the Respondent was in breach of the DPA in requiring her to share a mobile phone with user information on it that was accessible to others as it was shared. The user information was of a confidential and private nature and related to users of the Respondent that by its very nature would be confidential. To comply with the DPA the Claimant requested that she be provided with her own mobile phone for exclusive use so that such confidential information should not be accessible to others. In addition, she complained that service user's personal information was kept in an unlocked draw. These were matters that she had previously brought to the Respondents attention and to some extent were being dealt with by the Respondent. However, at the time of the letter of 21 February, these issues were not fully dealt with by the Respondent and in particular the mobile phone was still a shared one.

27. The Respondent argued that the Claimant did not have a reasonable belief that this disclosure was in the public interest and that she had written her letter to 'set up' the

Respondent for these proceedings knowing that the disclosure was not true as the Respondent had at least dealt with the provision of the locked filing cabinet and provided her with a mobile phone albeit it was shared. The Tribunal did not accept this submission. The Tribunal noted the guidance given in Kilrane and Chesterton Global above. The Claimant in this case had the reasonable belief that the information she disclosed did tend to show one of the listed matters in section 43 B (1) and that such disclosure was in the public interest. There was no evidence presented by the Respondent that prior to the writing of the latter of 21 February 2018, that the Claimant was trying to 'set up' the Respondent for this litigation in the Tribunal. The evidence that the Respondent referred to of the breakdown of the relationship between the parties occurred after the letter of 21 February and after the Claimant's dismissal.

28. Furthermore, as explained by Underhill LJ in Chesterton Global, the disclosure made by the Claimant can have both a subjective and an objective element. If the Claimant subjectively believed that the information she disclosed did tend to show one of the listed matters and the statement or disclosure she made had a sufficient factual content and specificity such that it was capable of tending to show that listed matter, it was likely that her belief would be a reasonable belief. Accordingly, we found her belief in respect of the disclosure at point (iii) was a reasonable belief. In addition, the Tribunal noted and followed the guidance given by the Employment Appeal Tribunal at paragraph 47 of its judgment in this matter, *'The ET apparently considered that the Claimant was primarily raising those matters as relevant to her assessment of her own performance. However, as is made clear in Chesterton Global, that would not necessarily mean that she did not reasonably believe that her disclosure was in the public interest. Indeed, considering the nature of the interest in question it would be hard to see how it would not - in the Claimant's reasonable belief - be a disclosure made in the public interest, even if (as the ET seems to suggest, see the penultimate sentence of paragraph 31 and the reasoning at page 32) the Claimant also had in mind the impact upon her in terms of her work performance; after all, the public interest need not be her only motivation for making the disclosure (again, see Chesterton Global)'.*

29. Accordingly, the Tribunal found that the disclosure made by the Claimant at point (iii) of her letter was a protected disclosure under section 43b. However, this is not the end of the matter. The issue for the Tribunal then became one of causation. The Tribunal then had to determine whether the Respondent's dismissal of the Claimant was motivated by the disclosure at point (iii) of her letter. In this regard we reminded ourselves that once the Claimant had made a protected disclosure the burden of proof was on the employer. Under the statute, it was for the employer to show the ground on which any act or omission was done. The causation test in these cases is whether the protected disclosure materially influenced the employer's treatment of the Claimant (in the sense of being more than a trivial influence- NHS Manchester v Fecitt [2012] IRLR 64).

30. In evidence to the Tribunal, the Claimant asserted that nothing had materially altered since the extension of the probation period by the Respondent by a further three months by way of its letter of 14 February and the dispatch of her letter of 21 February 2018 containing the protected disclosure at point (iii) and therefore her dismissal must have been informed or at least materially influenced by that protected disclosure. The Tribunal found that this was not the case as explained below.

31. In the facts section of this judgment the Tribunal found that a supervision meeting did take place between the Claimant and her line manager on 21 February 2018. In this meeting the Respondent again set out expected performance targets for the Claimant. These included targets to increase the number of service users for the Respondent's

services and outreach work that was expected of the Claimant. At pages 139 to 141 of the bundle the Tribunal found the Claimants own notes of this meeting which the Tribunal found confirmed that it was a supervision meeting setting targets for her. In addition, at the end of the meeting, the Tribunal found that the Claimant confirmed in her own words how difficult it was for her line manager to manage her and for her to take instructions from the line manager by saying, *'Her voice rose and she said that I was criticising her. I asked her why she always used this ruse when I was asking her serious questions. I saw no point in continuing so I packed up for the day……'* The Tribunal would not expect the Claimant to take such an attitude at a supervision meeting by walking out of it especially as she knew at this time that her probation period had been extended and this meeting was part of the extended probation period.

32. In the first judgment at paragraph 19, the Tribunal made reference to the Respondents management committee meeting on 24 February 2018 to discuss the Claimant's letter and the minutes of that management committee meeting were at pages 143 to 146 of the bundle of documents. At paragraph 19 of the first judgment, the Tribunal found that following receipt by the Respondent's management committee of the Claimants letter 21 February 2018 and the Claimants making unfounded allegations in respect of contractual documentation which she said was not provided to her, the Respondent decided to terminate the Claimant's employment as it was satisfied to the Claimant was not prepared to take reasonable instruction from the Respondent in respect of the performance issues that had already been identified to the Claimant.

33. In addition to these points and after reviewing the management committee minutes again for this hearing the Tribunal found that at item two of the minutes, the management committee asked the Claimant's line manager for an update on the Claimant's conduct and performance since the extension of her probation period on 14 February. The management committee were informed that the Claimant had not met any of her goals up to the extension and had not subsequently improved the rate of client referrals. The Claimant's line manager told the Respondent's management committee that this had not increased at all up to the date of the management committee meeting on 24 February 2018. She also said that the Claimant was still not promoting the service of the centre to the wider community and thus no referrals were coming in. Furthermore, the Claimants taking of instructions from the line manager was still an issue and the Claimant continued not to follow her instructions and continued to be obstructive since the extension of her probation period on 14 February. In addition, the line manager referenced complaints from service users concerning the Claimant's conduct and referred to a particular example in which service user JL had made a written complaint stating that the Claimant had 'an attitude and a bully spirit." The user went on to say that the Claimant 'acted in a shameful disgraceful manner', was 'rude' and added 'pain to injury' already sustained by the service user by way of her conduct. In addition, as stated above at paragraph 31, there was a further supervision meeting between the Claimant and her line manager on 21 February 2018 in which the Claimant demonstrated clearly that she was not willing to take instruction as she 'saw no point in continuing', with the supervision meeting and packed up for the day.

34. At paragraph 20 of the first judgment the Tribunal referenced the letter of dismissal which was dated 28 February 2018 and set out the reasons for the Claimant's dismissal. In response to the Claimant's assertion that nothing had changed from 14 February to 28 February 2018 save for her letter of 21 February containing item (iii) of her letter which she said was a protected disclosure, after reviewing the letter of dismissal and the notes of the management committee, the Tribunal found that as a matter of fact there were a

number of items that did change during this 14-day period. Firstly, the Claimant continued to fail to hit her targets in terms of referrals of service users to the Respondent. Secondly, she continued to fail to promote the services of the Respondent as she was previously instructed to do. Thirdly, she continued to fail to take and follow instructions from her line manager. Fourthly the Claimant continued to act rudely and disrespectfully towards her line manager. Finally, the Respondent received several complaints from users and referenced one specific written complaint from JL about the Claimants conduct.

35. As a consequence, the Tribunal did not find that the disclosure at point (iii) of the Claimants letter of 21 February 2018 materially influenced the Respondent's decision to dismiss her. The Claimant continued to demonstrate poor performance from the extension of her probation period on 14 February as demonstrated by her line manager at the management committee meeting on 24 February as outlined in the paragraph above. The Respondent had been dissatisfied with the Claimant's work performance for some time prior to her dismissal. This was the reason why the Respondent required her to prepare daily work records which the Claimant did on 28, 29 and 30 January 2018. Furthermore, this was the reason why on 14 February 2018 the Claimant's probation period was extended. The Claimant continued during the remaining 14-day period leading up to dismissal to fail to perform or conduct herself appropriately as outlined above. As a consequence, the letter of dismissal was sent to her after the management committee meeting on 24 March 2018. The letter of dismissal dated 28 February 2018 outlined the poor work performance and conduct issues which led to the Claimant's termination of employment and these reasons were supported by documentation produced by the Respondent at pages 137 – 142 of the bundle which showed supervision meeting notes and discussions in relation to targets that had been set for the Claimant. It is the Tribunals finding that the Claimant's employment was terminated for poor performance and/or conduct issues during her probation period and not for the protected disclosure at point (iii) of her letter of 21 February 2018. Accordingly, the Claimant's claim for automatic unfair dismissal under section 103A ERA is dismissed.

Employment Judge Hallen

1 July 2021